Filed 9/15/03 P. v. Vasquez CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT DANNY VASQUEZ,<br><br>Defendant and Appellant. | H024987<br>(Santa Clara County<br>Super. Ct. No. CC112223) |

Defendant Robert Danny Vasquez was charged by information with possession for sale of methamphetamine (Health & Saf. Code, § 11378, count 1), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 2), and misdemeanor being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a), count 3). A jury found defendant guilty of all three charges. The trial court suspended imposition of sentence and placed defendant on three years formal probation with various terms and conditions, including a nine-month county jail sentence.

Defendant argues on appeal that: (1) there is insufficient evidence that he knowingly possessed the methamphetamine that was the subject of both counts 1 and 2; (2) there is insufficient evidence that he possessed the methamphetamine with the specific intent to sell; (3) the trial court erred in failing to adequately respond to a jury question; and (4) the trial court violated his constitutional rights by allowing defendant's silence to negatively impact his sentence. We disagree with defendant's contentions, and therefore affirm.

## FACTS

The prosecution's case

San Jose Police Officer Wendell Martin testified as an expert in determining whether someone is under the influence of a stimulant, in the recognition of drug paraphernalia, and in the recognition of methamphetamine. He was working patrol and was in the parking lot of the White House Inn Motel on Monterey Road with two other officers at approximately 2:00 a.m., on May 16, 2001. While the three were talking, Martin noticed a white CRX pull up and saw two men get out and go into the motel office. The CRX then drove around the corner out of sight. A few minutes later one of the men came out of the office and walked upstairs toward a second floor room. Martin asked the man how much he paid for the room. When the man said that he had paid about $100, Martin laughed and said that he got "ripped off."

Martin then began talking generally with the man and asked him to come back downstairs, which he did. Martin told the man that he was there because there was a lot of illegal activity at motels along Monterey Road, especially prostitution and drug use. During their conversation Martin observed that the man's pupils were dilated and that he licked his lips often, as if his mouth was dry. These are two common objective symptoms of being under the influence of a stimulant, so Martin checked the man's pulse. It was approximately 120 beats per minute. At that point Martin felt that the man was under the influence of a stimulant. Martin asked the man if he could search him, and the man gave him permission to do so. Martin did not find any drugs or paraphernalia on the man.

As Martin went to see if he could contact the people still in the CRX, a woman came around the corner. Martin asked her if she was with the man standing with the other officers, and she said that she was. While talking with the woman, Martin saw the CRX leave. Martin noticed that the woman's pupils were dilated, that she seemed a little nervous, and that she kept moving from side to side. Because these are objective

symptoms of being under the influence of a stimulant, Martin checked the woman's pulse. It was over 100 beats per minute. Based on his training and experience, Martin felt that the woman was also under the influence of a stimulant. The woman gave Martin permission to search her, but he did not find any drugs or paraphernalia on her.

After he and the other two officers talked with the man and woman a bit more, they were told they were free to leave. After they left, Martin continued talking with the other two officers for about a minute. He then drove around the corner and stopped on Southside Drive. A few minutes later, the same white CRX drove by. Martin drove in the same direction as the CRX, which then pulled over, parked in a no parking zone, and turned off its lights. Martin pulled in behind the CRX without turning on his spotlight. He then walked up and spoke to defendant, the driver.

There were two other people in the car. The woman he had spoken to at the motel was in the back seat, and another woman was in the front passenger seat. Martin asked defendant if he would exit the car and come back and talk to him. When he did, Martin told defendant that he had done nothing wrong. Defendant said that he had dropped off the man and picked up the woman Martin had talked to at the motel. Martin said that he thought the woman was under the influence of a stimulant, and wanted to make sure nothing illegal was going on. As he was speaking with defendant, Martin noticed that defendant licked his lips often as if his mouth was dry, that defendant appeared very nervous, and that he appeared to be sweating. As these are objective symptoms of being under the influence of a stimulant, Martin checked defendant's pulse. It was over 100 beats per minute. Martin took a flashlight and shown it into defendant's eyes; they showed minimal reaction to the light. Based on his training and experience, Martin felt that defendant was under the influence of a stimulant.

Martin asked defendant if he had anything illegal on him, and defendant replied that he had a little marijuana in his pocket. Martin searched defendant and found a baggie of marijuana in defendant's front pants pocket. Martin also found a cell phone

and a pager in defendant's pants pockets. Defendant then got very nervous and started sweating a bit more. He told Martin that he did not feel good and asked if he could sit down. Martin told him that he could.

A records check had revealed that defendant was the registered owner of the CRX, so Martin asked defendant if there was anything illegal in his car. Defendant replied, "just beer." Martin then asked defendant if he could search the car, and defendant said, "go ahead." Martin had the two women exit the car and wait by his patrol car with another officer who was at the scene. Martin then searched the CRX and found a backpack in the back seat and beer in the hatchback area. Martin pulled the backpack out of the car and asked whose it was. Defendant said that it was his, so Martin searched the backpack. Inside one of the compartments of the backpack was a plastic bag containing an off-white powder. Based on his training and experience, Martin recognized the powder as methamphetamine. Martin also found in the same backpack compartment a bank statement with defendant's name on it, a traffic citation with defendant's name on it, and a paycheck stub. He found a propane torch in the large compartment of the backpack. The propane torch could be used to heat up pipes or aluminum foil used in ingesting controlled substances. Martin considered the amount of methamphetamine found, along with the cell phone and the pager, to be indicia of possession of the methamphetamine for sale.

At this point, defendant felt well enough to stand up. From then on defendant appeared fine and acted normal. Although Martin took defendant into custody, the woman from the motel who had been in the back seat of defendant's car was allowed to drive the car away.

The parties stipulated that the substance seized in the case was tested by a state certified analyst with the Santa Clara Crime Lab using scientifically reliable tests and methods, that the substance was determined to contain methamphetamine, and that it had a net weight of 13.84 grams. The parties further stipulated that defendant provided a

urine sample on May 16, 2001, to Martin shortly after his arrest, that the sample was submitted to the Santa Clara Crime Lab, that it was analyzed by a state certified forensic toxicologist using scientifically reliable tests and methods, and that the sample tested positive for methamphetamine.

San Jose Police Officer Jim Lisius testified as an expert on possession for sale versus possession for personal use of a stimulant. In Lisius's opinion, based on the totality of the circumstances, the methamphetamine found in defendant's backpack was possessed for sale. His opinion was based upon the quantity found, its value, the fact that defendant had a cell phone and pager, the fact that the methamphetamine was found in defendant's backpack, and the fact that no drug ingestion paraphernalia was found. A propane torch is not commonly used to ingest methamphetamine; usually a lighter is used. The crystal methamphetamine found was almost one-half ounce. A dealer could buy that amount on the street for $800 to $1000 and then cut it into 14 separate grams and sell each gram for $100, making at least a $400 profit. By selling it in quantities of one-quarter gram, even more could be made. A typical user has one-quarter gram of methamphetamine in his possession, but a heavy user may use one-half gram in a day. Since methamphetamine dealers are commonly also users, the fact that defendant was under the influence did not negate his opinion.

The defense case

Halle Weingarten, a forensic toxicologist, testified as an expert on the effects that methamphetamine has on the human body. She testified that the medical literature indicates that users with a high tolerance can use up to five grams of methamphetamine in 24 hours. Without knowing the tolerance of the individual, it is impossible to determine exactly how many uses that individual can get from 13.86 grams of crystal methamphetamine.

DISCUSSION

Sufficiency of the evidence

Defendant first challenges the sufficiency of the evidence to support his conviction of counts 1 and 2. He argues that there is insufficient evidence that he knowingly possessed the methamphetamine found in the backpack, and insufficient evidence that he possessed the methamphetamine with the specific intent to sell. The People argue that there was sufficient evidence to support both convictions.

" 'In assessing a sufficiency-of-evidence argument on appeal, we review the entire record in the light most favorable to the prevailing party to determine whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] The same standard applies to a conviction based primarily on circumstantial evidence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.)

Unlawful possession of methamphetamine for sale requires proof the defendant possessed the contraband with the intent of selling it with knowledge of both its presence and illegal character. (CALJIC No. 12.01; *People v. Harris* (2000) 83 Cal.App.4th 371, 374; see also, *People v. Parra* (1999) 70 Cal.App.4th 222, 225-226.) Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. (CALJIC No. 12.02; *People v. Meza, supra*, 38 Cal.App.4th at p. 1746.)

Defendant's first assertion that the prosecution failed to show that he was in constructive possession of the methamphetamine is without merit. In order to prove constructive possession, the prosecution must show that the accused had dominion and control over the contraband. (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.) The inference of dominion and control may easily be made when the contraband is discovered in a place over which the accused has general dominion and control, such as with his personal effects. (*Ibid.*; see also, *People v. Redrick* (1961) 55 Cal.2d 282, 285-287, and

cases cited therein.) This is true even where the accused shares control over the property. (*People v. White* (1969) 71 Cal.2d 80, 82-83; *People v. Rushing* (1989) 209 Cal.App.3d 618, 622.)

In this case, the methamphetamine was found in a backpack defendant admitted was his. The methamphetamine was in the same compartment of the backpack that held defendant's personal papers. The backpack itself was in the backseat of a car which was registered to defendant and which he was driving. This is sufficient evidence to support the finding of constructive possession needed for the conviction of both possession for sale and transportation. This is so even though there were two other people riding in defendant's car, one of them in the backseat.

Defendant's second assertion that the prosecution failed to show he possessed the methamphetamine for sale is likewise without merit. Intent to sell may be established by circumstantial evidence. (*People v. Harris*, *supra*, 83 Cal.App.4th at p. 374.) In cases involving possession of methamphetamine, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual, and convictions of possession for sale are upheld based on such testimony. It is for the jury to credit or reject such opinions. (*Id*. at pp. 374-375; see also *People v. Parra*, *supra*, 70 Cal.App.4th at p. 227.)

In this case, both Officer Martin and Officer Lisius, experts in the possession of methamphetamine, testified that, based on the quantity of the methamphetamine found and defendant's possession of a cell phone and pager, defendant possessed the methamphetamine with the intent to sell. Officer Lisius further testified that the lack of the presence of any drug ingestion paraphernalia, other than possibly the propane torch, was additional support for his opinion. These expert opinions are sufficient to support defendant's conviction of possessing the methamphetamine for sale.

Response to jury request

The jurors began deliberations at 11:25 a.m. on May 2, 2002. They began their lunch break at 11:40 a.m., and returned for further deliberations at 1:00 p.m. At 4:10 p.m., they sent a note to the court stating, "We, the jury in the above entitled cause, request the following: [¶] More explanation on count one. We are split on the first part, possession with intent to sell, but unanimous on the lesser part, possession. We have taken three votes so far. Any suggestions." The court responded in writing, "I cannot give further 'explanation' on count one. You already have the instruction which defines the crime [CALJIC No.] (12.01)[.] With regard to the procedure, I can only refer you back to the lesser included offense instruction [CALJIC No.] 17.10-if you are unable to reach a unanimous decision on count one (possession for sale), then you should advise me of that fact."[1] At 4:45 p.m., as they were released for the night, the jury sent a second note to the court. This one stated: "We have determined that we cannot come to a unanimous verdict one way or the other on count one. We have finished consensus on counts 2 and 3."

The jury began its deliberations at 9:15 a.m. on May 3, 2002. At 9:30 a.m., the jury was brought into the courtroom. The court[2] stated, "Mr. [foreperson], you have sent the Court a note on count 1. And what you've indicated is that in your considered judgment, the jury is hopelessly deadlocked. If the Court were to ask you to continue your deliberations, do you feel that there's a reasonable probability that you might arrive at a verdict?

---

[1] The court had previously instructed the jury on the lesser included offense of simple possession.

[2] Although the trial was conducted by Judge Jerome Brock, Judge Rise Pinchon conducted the proceedings on May 3, 2002, including the later receipt of the jury's verdict.

"JUROR: I think we were making some headway this morning in the few minutes we had. We did want to take another vote and see where we stand this morning after we've had a night's sleep on it.

"THE COURT: So I'll give you the opportunity to do that. Would you like to have any testimony reread or would that help anybody?

"JUROR: How about Officer Martin's testimony.

"THE COURT: Then I'll let you discuss that, then. If you feel you'd like to have something reread and that will assist you, then send out another note like you did before and indicate what you'd like. So I'll send you back in to continue your deliberations."

At 10:20 a.m., the jurors informed the court that they had reached a verdict.

Defendant argues that the court erred in failing to adequately respond to the jury's request for further explanation of possession with intent to sell. He argues that the court should have directed the jury to review CALJIC Nos. 2.02 [sufficiency of circumstantial evidence to prove specific intent], and 3.31 [concurrence of act and specific intent], as the note indicated that the jury had "zeroed in" on this issue and needed to know how to determine whether defendant had the specific intent to sell. The People argue that the court did not err or abuse its discretion by referring the jury to the instructions it did.

Penal Code section 1138[3] imposes on the trial court a mandatory "duty to clear up any instructional confusion expressed by the jury. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) "Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what

[3] "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." (Pen. Code, § 1138.)

additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

In this case the jury asked for "[m]ore explanation on count one," stating that it had determined the issue of possession but was split on the issue of intent to sell. The jury did not ask for instructions on how to determine whether defendant had the intent to sell, but simply indicated that it needed to know how it should further proceed. The court referred the jurors to CALJIC No. 12.01, which fully and completely explained the elements of the offense charged in count one, including the requirement that the jurors find that defendant had the intent to sell. The court further referred the jurors to CALJIC No. 17.10, which fully and completely explained how the jurors should proceed should they not agree that defendant had the intent to sell. The court then informed the jurors that they should advise the court if they could not reach a unanimous decision on count one. Although the jurors later sent a note stating they could not reach a unanimous decision, when questioned by the court they indicated that they were "making some headway." Within the next hour, the jurors reported that they had reached a verdict. We are satisfied that the court did not abuse its discretion in responding to the jurors' note as it did and that any error in failing to refer the jurors to CALJIC Nos. 2.02 and 3.31 did not prejudice defendant.

Sentencing

The probation report stated, "During the presentence interview, the defendant declined to make any statements with regard to the present offense, except to indicate he has learned a lesson from his criminal behavior. The defendant was sullen and claimed he was sorry he got involved with drugs. He knows he has a drug problem and wants help." The report went on to recommend that defendant be granted probation, and that a county jail sentence be imposed as a condition of probation.

At the sentencing hearing defendant's counsel requested that defendant "be allowed to serve any sentence in some sort of residential drug treatment program. There

was discussion of [defendant's] past history of drug abuse in the probation report." The prosecutor requested that a nine- or ten-month jail sentence be imposed. In response to a question by the court, defense counsel admitted that no residential drug treatment program had been set up. The court then stated that it would be imposing a jail sentence with a surrender date.[4] If and when a residential program was set up and ready to go, defendant could come back with a modification request, which the court would honor, depending upon when it was done and what type of program it was. The following then occurred:

"[DEFENSE COUNSEL]: And the only thing I would add as far as recommendation for moderate county jail sentence in response to [the prosecutor], I would just, again, add, and it's noted in the probation report, that [defendant] has no juvenile nor adult criminal history. This offense took place over a year ago in May and [he] has not had any arrests since this incident as well. It appears [defendant] has learned from his mistake. This is a one[-]time type of incident.

"THE COURT: Kind of hard to tell since [defendant] didn't really discuss it with the probation officer.

"[DEFENSE COUNSEL]: That's correct. And that was at my advice, Your Honor.

"THE COURT: And normally I understand that but in a case like this, I kind of like to have a little insight into what the defendant's thinking since it didn't happen at the trial, and I can't see any obvious reasons, such as being possible strike in the future. So I don't have any insight. [¶] So I kind of agree with [the prosecutor] here, but we will make your client eligible. Okay." The court then suspended imposition of sentence and placed defendant on three years probation with various terms and conditions, including a nine-month county jail sentence.

---

[4] Defendant had been out on bail pending sentencing.

Defendant argues that he had a constitutional right not to testify at his trial (U.S. Const., 5th Amend.), and that the trial court committed reversible error when it allowed defendant's silence to negatively impact his sentence, citing *Mitchell v. United States* (1999) 526 U.S. 314, and *Griffin v. California* (1965) 380 U.S. 609. The People argue that the record does not support defendant's contention that his silence was considered by the court when it determined his sentence.

In *Mitchell v. United States*, *supra*, the Supreme Court held that, "in determining facts about the crime which bear upon the severity of the sentence," a sentencing court may not draw an adverse inference from the defendant's silence. (526 U.S. at pp. 316-317.) "The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. *Griffin v. California*, 380 U.S. 609, 614 (1965). We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." (*Id*. at pp. 327-328.)

In this case, the record does not indicate that the sentencing court drew a negative inference from defendant's silence. Instead the record indicates that the court agreed with the probation department's recommendation that defendant be granted probation with a county-jail-sentence condition. Because defendant admitted having a drug problem and wanting help, the court was willing to allow defendant to serve the jail sentence in a residential drug treatment program. But defendant admitted that he had not yet been accepted into such a program. The court then told defendant that if and when he came back with a request for modification of the jail sentence with such a program in place, the court would honor it. The prosecution had requested a nine- or ten-month jail sentence, and defendant did not request a shorter term. The court therefore chose to impose a nine-month jail sentence. No reversible error has been shown.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.